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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Amendment of Part 1 of the)
Commission's Rules -- Competitive) WT Docket No. 97-82
Bidding Proceeding)
)
To: The Commission)

PETITION FOR LIMITED RECONSIDERATION AND CLARIFICATION

CONXUS Communications, Inc. ("CONXUS"), by counsel and pursuant to FCC Rule Section 1.429, petitions for limited reconsideration and clarification of the Commission's *Third Report and Order*, 13 FCC Rcd 374 (1998), 63 Fed. Reg. 2315 (January 15, 1998) ("Auction Order"), in the above-referenced proceeding, and shows the following:

I. Introduction.

1. CONXUS is implementing a nationwide narrowband Personal Communications Service ("PCS") system on its five regional 50/50 KHz narrowband PCS channels which will provide the public advanced two-way messaging service. CONXUS acquired its five regional 50/50 KHz narrowband licenses through competitive bidding as it did with various 900 MHz Specialized Mobile Radio ("SMR") Major Trading Area ("MTA") licenses it holds.^{1/} CONXUS, therefore, currently has quarterly installment payments which it must make to the U.S. government. As such, it has a vital interest in this proceeding.

^{1/} As a minority/female owned small business ("Designated Entity") CONXUS was afforded certain financial benefits in acquiring its licenses, including installment payments.

2. The Auction Order adopted certain modifications to the Commission's general auction and installment payment rules. Among the changes in the rules was the adoption of five and ten percent late payment fees for any installment payments not paid when immediately due. For installment payments which are paid 1 to 90 days after due, a five percent late fee was adopted. For installment payments which are 91 to 180 days late, a 10 percent late fee will be imposed. Concurrent with the adoption of these late payment fees, the Commission abolished the practice of licensees filing requests for deferrals of installment payments, instead electing to provide licensees with automatic 90 and 180 day grace periods at the cost of the late payment fees.

3. CONXUS seeks reconsideration of the Commission's adoption of late payment fees for the following three reasons. First, the fees will serve to exacerbate PCS and other Commission licensees in financial distress, heaping more pressure on those licensees already teetering on the brink of default; second, as applied to existing licensees, such as CONXUS, the modified rules constitute impermissible retroactive rule making; and third, inasmuch as existing licensees have purchased their licenses from the government for valuable consideration, including specified repayment terms, modification of those payment terms now, without the consent of the licensees, constitutes a breach of contract.

II. Imposing late payment charges on licensees is unnecessary and potentially harmful.

4. The fundamental problem with the late payment charges is that they are a bad idea. These charges are punitive. Charges of five percent where payments are late for 1-90 days and ten percent where payments are late for 91-180 days are clearly excessive. These charges would overcompensate the government for any lost time value of the payments due.

5. Moreover, the purpose of late payment charges generally is to assure prompt payment of sums due. Where the Commission has the ultimate power of taking back the license auctioned, however, there would appear very little need for additional leverage over licensees.

6. Furthermore, a substantial number of PCS licensees (both narrowband and broadband) are currently in financial distress and could very well default. Wholesale defaults in the PCS industry could further impede the flow of capital to the industry and cause even more licensees to become financially distressed. Cascading punitive late payment charges on PCS licensees can only worsen their financial situation. Thus, if for no other reason, the Commission should abstain from imposing these charges on licensees until the situation with respect to the PCS industry stabilizes.

III. Applying late payment fees to existing installment debt constitutes retroactive rule making.

7. Imposition of a late payment rule on licensees who have already received their licenses pursuant to auctions already conducted would amount to an unequitable retroactive application of

new rules. The Supreme Court, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988), explained that the law does not favor retroactivity. Thus, as a general matter, the statutory basis for a rule with retroactive effect must explicitly authorize the retroactive application. *Id.* This is supported by the specific wording of the definition of the word "rule" by the APA:

the whole or a part of an agency statement of general or particular applicability and *future effect*....

5 U.S.C. §551(4) (emphasis added). See also 1 K. Davis & R. Pierce *Administrative Law Treatise* § 6.6 at 257-60 (3d ed. 1994). Nothing in Section 309 or any other provision of the Act, explicitly allows the retroactive application of late payment fees. Accordingly, the Commission's adoption of them as to existing licensees is unlawful.^{2/} More recent authority adds further support to this position. See, e.g., *Landgraf v. U.S.I. Film Products*, 114 S.Ct. 1483 (1994);^{3/} *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994).

8. As Justice Story long ago explained: A law is retroactive if it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations

^{2/} See also 488 U.S. 216 (Scalia, J., concurring).

^{3/} There, explaining the presumption against the retroactive effect of statutes, the Court said:

The Legislature's unmatched powers allows it to sweep away settled expectations suddenly and without individualized consideration.

already past. *Society for Propagation of the Gospel*, 22 F. Cas. 756, 767 (No. 13,516 (C.C.N.H.) (Story, J.)). In adopting late payment charges as to existing installment debt, the late payment rule plainly constitutes retroactive rule making.

9. Even prior to the adoption of the APA, the Supreme Court had established the overriding criterion that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" of frustrating the interest that the rule promotes. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).^{4/} Whether, after applying the balancing test mandated by *Chenery*, retroactivity is permissible, is a legal question that can be resolved only by analyzing the applicable facts and circumstances. *Retail Union*, at 390. When such questions are presented to reviewing courts, the courts treat them as a question of law for which no overriding obligation of deference to the agency exists. *Id.*

10. The court in *Retail Union* enunciated the particular factors to be considered in balancing the hardship from retroactive application against any public interest considerations. *Retail Union*, at 390. See also *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175, 182 (1984). These include (a) whether the issue presented is one of first impression; (b) whether the new rule presents an abrupt departure from well-established practice; (c) the extent to

^{4/} See also *Retail, Wholesale, and Dep't Store Union v. NLRB*, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("*Retail Union*") and *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit recognized the governing applicability of the *Chenery* test.

which the party against whom the new rule is applied relied on the former rule; (d) the degree of burden which a retroactive rule imposes on a party; and (e) the statutory interest in applying a new rule despite the reliance of a party on the old standard. Each of these factors should have been, but were not, considered by the Commission when it determined how to apply its new rule.

11. The *Auction Order* includes no discussion of why the rules should be applied retroactively, and any reasoned consideration of such factors can lead only to a determination not to apply the new rule retroactively. First, this is not a case of first impression, as evidenced by prior rules on this subject. Second, the new rule constitutes an "abrupt departure" from established practice, wherein there was no late payment penalty. Third, the next *Retail Union* consideration, i.e., the extent to which the licensee may have relied on prior rules, can be readily answered simply by looking at the terms of the notes executed by various parties after being directed to do so by the Commission, and seeing that they include no late payment penalty terms. Fourth, the new rule imposes a substantial burden on a licensee who is only one day late in paying its installment debt. Previously licensees had an automatic 90 day grace period in which to pay an installment payment without being in default. Thus, the new rule deprives licensees of existing rights. Fifth, the last *Retail Union* criterion to be applied is the statutory interest in applying a new rule retroactively. Here, there is none. As the Commission has effectively determined not to utilize installment payment options

any longer, there is no bona fide statutory interest to be achieved by applying the rule any way, much less retroactively.

12. In sum, the Commission did not consider the criteria that it was required to consider prior to adopting this rule. And if it had considered them properly, retroactive application would not have been mandated.

IV. Application of late payment fees to existing installment debt breaches existing contracts with the government.

13. With the advent of auctions and installment payments, the Commission assumed the role of a contracting party. Unfortunately, when the Commission promulgated its late payment provision, it appears to have forgotten that a party to a contract may not unilaterally change the terms of its agreement. Because the Commission has entered into various contracts with its licensees in the form of promissory notes and security agreements, the Commission is not now empowered to unilaterally change the terms of those agreements any way it wants, any time it wants. *See, e.g., United States v. Windstar Corporation*, 116 S.Ct. 2432 (1996).

14. The Commission's newly adopted late payment charges are inconsistent with the terms under which CONXUS purchased its PCS spectrum at auction from the government, as well as with the terms of various promissory notes executed between the government and licensees. Indeed, licensees who were forced to sign such notes as a condition of remaining eligible for an installment payment program are now told that the government will not be held to the very contract terms that it thrust upon them. In fact, recognizing the inconsistency created between existing notes and the revised

rules, the Commission is now demanding that licensees sign new notes that include changes (*i.e.*, the penalty provisions) that significantly disadvantage them. This amounts to a breach of contract, opening the government up at a minimum to damages for violation. *Id. See also California Federal Bank v. United States*, 1997 W.L. 780936 (Fed. Cl. December 22, 1997).^{5/}

V. Conclusion.

15. The Commission has of late made much ado about the need to maintain the "integrity" of its rules. It is thus particularly inappropriate for the Commission to change, after the fact, key components of its installment payment program when it suits the Commission's fancy. This failing is particularly egregious where, as is the case here, the persons disadvantaged are the very small businesses for whom Congress mandated the Commission to provide special assistance. The new rule is even more inexcusable and impermissible when viewed in the context of the contractual arrangements that have already been entered into with licensees

^{5/} On a related matter, CONXUS requests the Commission to clarify that FCC Rule Section 1.2110 does not allow it to require installment payment licensees such as CONXUS, which did not enter into installment payment notes to obtain their narrowband PCS licenses, to now execute such notes. Since no such notes were required for CONXUS to obtain its narrowband PCS licenses, the Commission cannot now unilaterally impose this obligation on CONXUS without breaching the terms of CONXUS's purchase of spectrum from the government.

governing installment payment obligations. Accordingly, the Commission's late payment penalty rule must be rescinded.

Respectfully submitted,

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